No. 82-1280

In the Supreme Court of the United States

OCTOBER TERM, 1982

SPAWR OPTICAL RESEARCH, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an Executive Order preserving export regulations during a nine-month lapse of statutory restrictions was a valid exercise of presidential authority.

2. Whether statutory and regulatory changes subsequent to petitioners' unlawful acts require abatement of their prosecution.

3. Whether petitioners were denied a fair trial by alleged prosecutorial misconduct.

4. Whether co-conspirator statements were properly admitted.

5. Whether the evidence was sufficient to support petitioners' convictions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous—Continued

Miscellaneous—Continued Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-31) is reported at 685 F.2d 1076.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1982 (Pet. App. A-2). The opinion was modified and a petition for rehearing was denied on November 10, 1982 (Pet. App. B-2 to B-4). The petition for a writ of certiorari was filed on January 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners Spawr Optical Research, Inc. and Frances Spawr were convicted of misrepresenting shipment values in Shipper's Export Declarations ("SEDs") submitted to the United States Customs Service, in violation of 18 U.S.C. 1001 (Counts 1-6); petitioner Spawr Optical Research, Inc. was also convicted of unlawfully exporting laser mirrors to Germany knowing that the mirrors would be transshipped to the Soviet Union, in violation of 50 U.S.C. App. 2405(b) (Counts 7-9); and all three petitioners were convicted of conspiracy to export without a license, in violation of 18 U.S.C. 371 (Count 10), and unlawfully exporting laser mirrors to Switzerland knowing that the mirrors would be transshipped to the Soviet Union, in violation of 50 U.S.C. App. 5(b), Exec. Order No. 11940 (3 C.F.R. 150 (1976 Compilation)), and export regulations (Counts 11-14) (Pet. App. A-3 n.1).[1] Peti-

[1] Prosecution on Counts 11-14 was brought under the Trading With the Enemy Act ("TWEA") (50 U.S.C. App. 5(b)) and Executive Order No. 11940 because the violations charged in those counts occurred in February 1977, during a lapse of the Export Administration Act of 1969 (50 U.S.C. App. 2401 *et seq.*) ("EAA"). The EAA expired on September 30, 1976 and was reenacted with amendments on June 22, 1977 (Pub. L. No. 95-52, 91 Stat. 235). Prosecution on Counts 7-9 was brought under the EAA because the violations charged in those counts took place prior to the lapse. As we explain below, Exec. Order No. 11940 maintained the EAA regulations proscribing shipment of specified strategic materials to certain foreign countries during the lapse.

Petitioner Frances Spawr was acquitted on Counts 7-9; the jury was unable to reach a verdict on Counts 1-9 as to petitioner Walter Spawr; and Count 15 was dismissed during trial as to all petitioners (Tr. 1984-1985, 2415, 2429, 2436-2440, 2443, 2446-2447).

tioner Spawr Optical Research, Inc., was sentenced to pay fines totalling $100,000. Petitioner Frances Spawr was sentenced to concurrent terms of five years' imprisonment on Counts 1-6 and 10-14, all of which were suspended in favor of five years' probation, and was required to contribute 500 hours of service to charitable institutions as a condition of probation. Petitioner Walter Spawr was sentenced on Count 10 to essentially the same terms as Frances Spawr, and was sentenced on Counts 11-14 to concurrent terms of ten years' imprisonment, the first six months to be served in a jail-type institution, the balance suspended (Pet. App. A-3 to A-4 n.1; Tr. 2501-2507). The court of appeals affirmed (Pet. App. A-2 to A-31).

The evidence at trial established that petitioners Walter and Frances Spawr formed petitioner Spawr Optical Research, Inc., in 1969. Walter Spawr served as president of the corporation, and Frances Spawr as its secretary-treasurer; together with a third individual they constituted the corporation's board of directors. From 1973 through 1978 the corporation was engaged in manufacturing and polishing laser optics and mirrors, and by 1975 a substantial portion of petitioners' business came from major government defense agencies and contractors (Pet. App. A-5; Tr. 302-303, 306, 538; Exhs. 18, 29, 31).[2]

In 1974 petitioners began to explore international markets for their products. They established a business arrangement with Wolfgang Weber, a West German national, calling for Weber to promote and

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[2] Before establishing Spawr Optical Research, Inc., petitioners Walter and Frances Spawr were employed by North American Aviation (now Rockwell International), where Walter Spawr developed an advanced process for polishing mirrors (Pet. 13).

distribute Spawr mirrors in Central and Eastern Europe, including Communist bloc countries. Weber, who was named as an unindicted co-conspirator with petitioners and who testified as a government witness at trial, arranged and facilitated the two orders of laser mirrors that underlie petitioners' convictions (Pet. App. A-5 to A-6).

Petitioners' general manager, Walter Becker, attended a conference on export regulations sponsored by the Commerce Department in January 1974, and thereafter he and petitioner Walter Spawr received and reviewed an export classification list (Tr. 314-316). The list specified (Exh. 33, at 2-3) that a license was required to export laser optical elements to country group "V" (which includes West Germany and Switzerland) and country group "Y" (which includes the Soviet Union). If an exported item were valued at $500 or less a license was not required for group "V" countries, but was for group "Y."

In October 1975 Walter Spawr provided Weber with sample laser mirrors to exhibit at a trade show in Moscow. The mirrors attracted considerable interest, and in December 1975 Weber again went to Moscow, with Walter Spawr's approval, to discuss the prospect of sales to the Soviet purchasing agency Mashpriborintorg. Weber obtained petitioners' authorization to accept Mashpriborintorg's order for laser mirrors in January 1976, and when Weber visited California in late spring of that year, petitioners provided him with some of the mirrors for the order. In July petitioners shipped the balance of the order to Weber in West Germany. In the shipping documents accompanying the order, petitioner Frances Spawr falsely listed the value of the mirrors

as $500.[3] Weber forwarded the entire order to Mashpriborintorg in Moscow.[4] Petitioners never attempted to obtain a license for the mirrors exported in this first order (Pet. App. A-6 to A-7).

In April 1976 Weber telephoned petitioner Walter Spawr from Moscow and advised Spawr that he had received a second Soviet order for laser mirrors. Spawr told Weber that he thought it might be better to ask for an export license for at least part of the order, and Weber therefore provided him with an end-user statement (Pet. App. A-7). On May 4, 1976, petitioner Walter Spawr filed an application with the Commerce Department for an export license covering 14 of the 29 laser mirrors in the second Soviet order (Pet. App. A-7; Exhs. 15, 18, 28).[5]

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[3] Jackie Topping, a former employee of Spawr Optical Research, testified that petitioner Frances Spawr directed her to record a false value of $500 for the laser mirrors on invoices and other shipping documents in the order, when in fact they had a value significantly more than that amount, "so that we wouldn't be required to have an export license" (Tr. 568, 602-607; see Exhs. 2-3).

[4] Weber testified that he told petitioner Walter Spawr he would forward the order from West Germany to Mashpriborintorg in Moscow, and that Mashpriborintorg was a Soviet purchasing agency (Tr. 772-773, 804-805, 813-814). It was stipulated at trial that Mashpriborintorg was an agency of the Soviet government (Tr. 1169).

[5] Jackie Topping testified that petitioner Frances Spawr told her, about the time the application was filed, that she did not expect the Commerce Department's approval because the laser mirrors were "going to Russia," but that they "would still send the mirrors" even if the application were denied (Tr. 575-576). Weber testified that while the application was pending he had several conversations with petitioner Walter Spawr regarding the order. Weber told Spawr that licenses

The Commerce Department denied the export license application on October 7, 1976, stating (Exh. 73; see Tr. 591, 598) that the

> application covering various laser mirrors * * * for export to the U.S.S.R. had been denied for national security reasons pursuant to the Executive Order Number 11940, dated September 30, 1976, and the Export Administration Regulations * * *. These laser mirrors * * * had significant strategic applications. They have been denied in view of the predominant use with CO_2 lasers, which have important applications in the military arena * * *. [E]xports of such * * * commodities to Eastern European destinations could contribute significantly to the military capabilities as to constitute a potential threat to our national security.

Spawr informed Weber that the application had been denied; at Spawr's request, Weber sent him a letter cancelling the order. In fact, the Soviets did not cancel the order, and petitioners, together with Weber, set in motion a contingency plan they had devised earlier. In February 1977 petitioners shipped the laser mirrors to a freight forwarder in Zurich, Switzerland, falsely listing the value of the mirrors

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to export optics for lasers with an output of less than 1200 watts were routinely approved by the Commerce Department, and that any shipment declared to be valued at less than $500 would require no license. Weber told Spawr that the shipment of laser mirrors could be sent to Switzerland, and then forwarded to the Soviet Union (Tr. 816-818). Topping testified that after the application was rejected petitioner Frances Spawr told her that they "would still sell the mirrors to Russia" by "using some address in Switzerland" (Tr. 592-596).

at $500.[6] Weber then relabelled the boxes containing the mirrors and forwarded them to Moscow (Pet. App. A-7 to A-8; Tr. 748-749, 822-827; Exhs. 4-7, 14).

ARGUMENT

1. Petitioners contend (Pet. 36-47) that Exec. Order No. 11940, 3 C.F.R. 150 (1976 Compilation), did not preserve export regulations during the lapse of the Export Administration Act of 1969 ("EAA"), 50 U.S.C. App. 2401 *et seq.*, because (1) there was no "national emergency" permitting such executive authority; (2) the regulations were not rationally related to any national emergency; and (3) the lapse of the EAA shows that Congress intended to terminate the regulations. Petitioners therefore conclude that the United States lacked authority to prosecute them for exporting laser mirrors under the second Soviet order (Counts 11-14),[7] which occurred during the lapse of the EAA. The court of appeals correctly

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[6] Corine Pettit, an employee of Spawr Optical Research, testified that petitioner Frances Spawr directed her to prepare two different invoices for the February 1977 shipments to Switzerland, listing the value of the laser mirrors as $500 because "Customs wouldn't allow anything over five hundred dollars to go out of the country" (Tr. 1900).

[7] Petitioners also contend (Pet. 36-37 n.14) that a finding that Exec. Order No. 11940 was constitutionally defective would similarly result in a reversal of Counts 3-6, since those counts were based on a regulation (15 C.F.R. 30.7) that would also be constitutionally defective. Contrary to petitioners' assertion, 15 C.F.R. 30.7—which prescribes the information required to be included on SEDs—was issued under the authority of 13 U.S.C. (& Supp. V) 301-307. That statute did not lapse from October 1, 1976 to June 22, 1977. Thus, any constitutional defect in Counts 10-14 would not affect Counts 3-6.

found these claims to be without merit (Pet. App. A-8 to A-21). Its conclusion does not warrant further review.

Executive Order No. 11940 was issued by President Ford on September 30, 1976, under the authority of the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. 5(b),[8] to preserve regulations forbidding the shipment of strategic materials to certain foreign countries under the EAA, which was to expire on that date. The TWEA authorized the President, during a presidentially declared national emergency, to "regulate, * * * prevent or prohibit * * * any * * * exportation of * * * or transactions involving any property in which any foreign country * * * has any interest." 50 U.S.C. App. 5(b)(1)(B). As this Court has observed, "both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power." *Dames & Moore* v. *Regan*, 453 U.S. 654, 672 (1981); see *United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 573 (C.C.P.A. 1975). Executive Order No. 11940 was issued pursuant to the express authority of TWEA to "regulate * * * exportation" during a period of national emergency. The executive order is therefore " 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the bur-

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[8] TWEA was amended on December 28, 1977, to eliminate the reference to "national emergency". Pub. L. No. 95-223, 91 Stat. 1625. Thus, the issue involved in this case—reliance on TWEA for the continuation of export regulations—cannot arise again. However, to the extent that a national emergency was declared prior to the 1977 amendment, the President's powers were not diminished by the change. Pub. L. No. 95-223, Section 101(b) and (c), 91 Stat. 1625.

den of persuasion would rest heavily upon any who might attack it.' " *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 668, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

a. Rather than declare a new national emergency under Executive Order No. 11940, President Ford relied on the continued existence of national emergencies declared in 1950 concerning the Korean war and communist aggression (Proclamation No. 2914, 3 C.F.R. 99 (1949-1953 Compilation)), and in 1971 concerning an international monetary crisis (Proclamation No. 4074, 3 C.F.R. 60 (1971-1975 Compilation)). The court of appeals correctly concluded (Pet. App. A-13 to A-15) that the validity of the declaration and the duration of the national emergency were " 'essentially political questions.' " [9] See *United States* v. *Yoshida International, Inc.*, *supra*, 526 F.2d 579 ("courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency"); see also *Baker* v. *Carr*, 369 U.S. 186, 211-214 (1962). The court of appeals nevertheless went on to note (Pet. App. A-15 n.9) that review of the duration of the national emergencies relied on in this case "would probably not help" petitioners, since congressional action and case law support the conclusion that these national emer-

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[9] The court of appeals observed (Pet. App. A-13 to A-14) that TWEA "contained no standards by which to determine whether a national emergency existed or continued; in fact, Congress had delegated to the President the authority to define all of the terms in [Section 5(b)(3)] of the TWEA including 'national emergency', as long as the definitions were consistent with the purposes of the TWEA. 50 U.S.C. App. 5(b)(3)."

gencies remained in effect until September 14, 1978, the date fixed by the National Emergencies Act of 1976, 50 U.S.C. 1601(a)(2), (3). See S. Rep. No. 95-466, 95th Cong., 1st Sess. 2 (1977); *Cornet Stores* v. *Morton*, 632 F.2d 96, 97 (9th Cir. 1980), cert. denied, 451 U.S. 937 (1981); see also *Baker* v. *Carr*, *supra*, 369 U.S. at 211-214.

In any event, the impending lapse of regulations restricting exportation of strategic materials itself created a national emergency justifying the issuance of Executive Order No. 11940. Our national security depends on the relative posture of the United States and the Soviet Union in strategic arms and equipment capability, which in turn is directly related to ongoing development of advanced technology. Recent reports confirm that the Soviets have gained substantial advantage by copying high technology weapons systems that were developed in the United States—the problem of "technology transfer."[10] Laser technology has undoubted military and strategic applications.[11] As the Department of Commerce stated in

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[10] See M. Getler, *In Arms, Russian Bear is also a Copycat*, Wash. Post, Mar. 11, 1983, § A, at 1, 8; R. Perle, *Technology and the Quiet War*, Strategic Review 29-35 (Winter 1983); R. Barnard, *Pentagon Tightens Grip on Great Mass of Information*, Defense Week 10-11 (Jan. 24, 1983); S. Rep. No. 97-664, 97th Cong., 2d Sess. 59-66 (1982); W. Taylor, *U.S. Technology Enhances Soviet Weaponry*, Balt. Sun, Feb. 1, 1982, at 1; J. Bucy, *Technology Transfer and East-West Trade: A Reappraisal*, 5 International Security 132-151 (Winter 1980); M. Miller, *The Role of Western Technology in Soviet Strategy*, 22 Orbis 539-568 (Fall 1978).

[11] Comptroller General of the United States, GAO, *DOD's Space-Based Laser Program—Potential, Progress, and Prob-*

denying petitioners' application for a license to export the second Soviet order (Exh. 73), the laser mirror had "strategic applications * * * in the military arena * * * [sufficient] to constitute a potential threat to our national security." Indeed, the Assistant Secretary of Defense for International Security Policy has characterized petitioners' exportation of laser mirrors as having "significant implications for the U.S.-Soviet strategic balance" (R. Perle, *Technology and the Quiet War*, Strategic Review 33 (Winter 1983)), and has reported that the commander of the Air Force Weapons Laboratory estimates that "the mirrors exported by Spawr Optical saved the Soviet Union millions of dollars and nearly one hundred man-years of [research and development] effort" (*ibid.*).[12]

The lapse of EAA restrictions on strategic exports would have allowed uncontrolled shipments of high technology materials to Communist bloc countries. Thus, the impending lapse itself created a national emergency justifying the President's action in issuing Executive Order No. 11940.

b. It is equally clear that the President's action was rationally related to the national emergencies

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lems (unclassified digest) (Feb. 26, 1982); United States Central Intelligence Agency, *Soviet Acquisition of Western Technology* 3-6 (April 1982 & photo reprint 1982) (noting the "military importance" of laser, optic, and other high technology fields to the Soviet Union).

[12] The determination that these laser mirrors were of strategic significance is nonjusticiable. See *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) ("The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches" (emphasis in original)).

upon which it relied. Executive Order No. 11940 was, of course, specifically directed toward preserving export restrictions the lapse of which would have posed a threat to national security. But Proclamation No. 2914, *supra*, also declared a continuing national emergency based in part on events that "imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict[,]" 3 C.F.R. 99, 100 (1949-1953 Compilation), and was specifically invoked by President Ford in Executive Order No. 11940. As the court of appeals concluded (Pet. App. A-17), "President Ford's effort to limit the exportation of strategic items clearly had a rational relationship to the prevention of aggression and armed conflict."

c. Petitioners' claim (Pet. 42-43) that Congress intended to terminate EAA regulation of strategic exports by allowing the statute to lapse is rebutted by both the legislative history and common sense. The legislative history of the Export Administration Amendments of 1977 makes clear that the EAA was allowed to lapse for nine months only because Congress could not resolve questions relating to the anti-boycott provisions. See *Arab Boycott: Hearings on S.69 and S.92 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 1 (1977) (Sen. Stevenson). It is frivolous to suggest that Congress intended unrestricted exportation of strategic materials for nine months, and as the court of appeals observed (Pet. App. A-20), petitioners "offered no evidence that Congress intended to dismantle the export controls." On the contrary, the continuation of the export controls established by the EAA was seen as vital. See, *e.g.*, 122 Cong. Rec. 31921 (Rep. Michel),

31923 (Rep. Hammerschmidt), 31929 (Rep. Morgan), and 31936 (Rep. Bingham) (1976).[13]

Furthermore, the EAA had previously lapsed three times, and in each instance the President, relying upon the same unrevoked declarations of national emergencies and upon Section 5(b) of the TWEA, issued executive orders virtually identical to Executive Order No. 11940 to maintain the export regulations.[14] As Congressman Bingham, Chairman of the House International Relations Subcommittee on International Economic Policy and Trade, remarked in hearings concerning the President's use of the TWEA: "One of the reasons why the Export Administration Act has been allowed to expire so many times is because there was [the TWEA] * * *." *Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 30, 136 (1977).

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[13] The declaration of policy in the EAA, 50 U.S.C. App. 2402—reenacted on June 22, 1977 in the Export Administration Amendments of 1977 (Pub. L. No. 95-52, 91 Stat. 235)—states: "(1) It is the policy of the United States * * * (B) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other nation or nations which would prove detrimental to the national security of the United States. * * * (2) It is the policy of the United States to use export controls * * * (C) to the extent necessary to exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States."

[14] See Exec. Order No. 11810, 3 C.F.R. 905 (1971-1975 Compilation); Exec. Order No. 11796, 3 C.F.R. 888 (1971-1975 Compilation); Exec. Order No. 11677, 3 C.F.R. 719 (1971-1975 Compilation).

Indeed, Congress expressed approval of the President's reliance on the TWEA to maintain export regulations. In passing the 1977 amendments to the TWEA, Congress stated that it had proceeded cautiously, out of "concern for preserving *existing regulations imposed under emergency authority*, including * * * * * the transaction control regulations, which prohibit U.S. persons from participating in shipping strategic goods to * * * the Soviet Union" (S. Rep. No. 95-466, 95th Cong., 1st Sess. 3 (1977) (emphasis added)). The inference of Congress's approval is therefore "supported by more than mere congressional inaction," *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); see *Haig* v. *Agee*, 453 U.S. 280, 291-292 (1981), and leads to the "unmistakable [conclusion] that Congress intended to permit the President to use the TWEA to employ the same regulatory tools during a national emergency as it had employed under the EAA" (Pet. App. A-20 to A-21).

d. Petitioners' related claim (Pet. 45-46) that they were denied due process because they did not have fair notice of the specific conduct forbidden is refuted by the *actual notice* they had received.[16] As the court of appeals observed (Pet. App. A-12 n.7),

> Walter Spawr had been in contact with the Department of Commerce throughout the summer of 1976 when the license application was pending and was told not to ship the mirrors without

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[16] Petitioners also had constructive notice of the proscribed conduct. Executive Order No. 11940 was published in the Federal Register on October 4, 1976 (41 Fed. Reg. 43707). Publication in the Federal Register constitutes constructive notice to all persons affected by the regulation. 44 U.S.C. 1507; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947).

> a license. Frances Spawr was obviously aware of the regulations because she directed an employee to undervalue the mirrors specifically to avoid the required license. The applicable export regulations reissued under Executive Order No. 11940 were identical to those pursuant to which [petitioners] submitted their application.

Moreover, petitioners received written notification (Exh. 73) of the denial of their export license application, which unequivocally informed them that the proposed exportation of laser mirrors was prohibited because of the "potential threat to [our] national security." As the court of appeals concluded (Pet. App. A-12 n.7), "Under these circumstances, a person of ordinary intelligence would have been given fair notice that the contemplated conduct was forbidden." [16]

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[16] Petitioners' reliance (Pet. 45) on *United States* v. *Bishop*, 555 F.2d 771 (10th Cir. 1977), is misplaced. There, appellant was convicted of sabotage in a time of national emergency, in violation of 18 U.S.C. 2153(a), for his 1969 destruction of four high voltage line towers supplying electricity to the Denver Metropolitan area. Several defense contractors and installations were located within that area, and appellant's intent was "to create domestic turmoil which would require the government to bring back troops from Vietnam." 555 F.2d at 773. The national emergency relied upon to charge violation of 18 U.S.C. 2153(a) was declared in Proclamation No. 2914, *supra*, relating to the Korean War and "communist aggression." The court concluded (555 F.2d at 777) that the 18-year old proclamation, which had not been extended for purposes of the Federal Sabotage Act, failed to provide fair notice of the specific conduct forbidden. Petitioners in the present case, by contrast, had actual notice of the proscribed conduct; moreover, they had constructive notice because Executive Order No. 11940, issued in 1976, specifically extended application of Proclamation No. 2914 (as well as Proclamation No. 4074, *supra*) for purposes of preserving the EAA ex-

For these reasons, the court of appeals was correct in concluding (Pet. App. A-21) that "the President had the authority during the nine-month lapse in the EAA to maintain the export regulations."

2. Petitioners next contend (Pet. 48-56) that because of an amendment to the TWEA[17] and an amendment to former Commodity Control List Entry 7299 (25) (A) (see 15 C.F.R. 399.1 supp. 1, Entry No. 1522A, at 476)[18] between the time of the unlawful acts and the indictment, the common law principle of abatement precludes application of the earlier regulatory provisions. This claim is without merit.

The court of appeals correctly concluded (Pet. App. B-3) that "abatement does not apply here" because of the general savings statute, 1 U.S.C. 109. This Court has recognized that the purpose of the general savings clause in 1 U.S.C. 109 is to avoid the common-law presumption that the repeal of criminal statutes results in abatement of prosecutions that have not reached final disposition in the highest court authorized to review them. See *Warden, Lewisburg Penitentiary* v. *Marrero*, 417 U.S. 653, 660 (1974); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 554-555 (1954); see also *United States* v. *Ramirez*, 480 F.2d 76, 78 (9th Cir.), cert. denied, 414 U.S. 1012 (1973); *United States* v. *Brown*, 429 F.2d 566, 568 (5th Cir. 1970). The relevant inquiry concerns

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port restrictions during the lapse under the authority of the TWEA. See *Real* v. *Simon*, 510 F.2d 557, 560 (5th Cir. 1975).

[17] Pub. L. No. 95-223, 91 Stat. 1625 (eliminating reference to "national emergency").

[18] The amendment increased the output power for lasers and specially designed components and parts, including mirrors, above which validated export licenses are required, from 1200 watts to 2500 watts.

the statute in effect on the date of the illegal act, not when the indictment was returned.

The 1977 amendments to the TWEA specifically preserved, for a two-year period beginning July 1, 1977, all regulations then in effect that were issued under a presidentially declared national emergency pursuant to the TWEA. Pub. L. No. 95-223, Section 101(b) and (c), 91 Stat. 1625. The date initially chosen was actually June 1, 1977, in order to preserve the EAA regulations effective under Executive Order No. 11940. But after enactment of the Export Administration Amendments of 1977 on June 22, 1977, it was unnecessary to include the EAA regulations in the grandfather clause,[19] and the date was changed to July 1, 1977. See H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 3 (1977). Thus, there is no reason to abate petitioners' prosecution because of amendments to the TWEA.

Petitioners' claim concerning changes in the Commodity Control List is equally insubstantial. Since

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[19] Petitioners err in suggesting (Pet. 51-52) that 1 U.S.C. 109 is inapplicable because prosecutions are not mentioned in the savings provision contained in the Export Administration Act of 1979, 50 U.S.C. App. (Supp. IV) 2420. That section in fact states that "[a]ll * * * regulations * * * which have been * * * issued * * * under the * * * Export Administration Act of 1969 and which are in effect at the time this Act takes effect shall continue in effect according to their terms * * *." Section 2420(a). The mere statement in Section 2420(b) that "[t]his Act shall not apply to any administrative proceedings * * * pending at the time this Act takes effect" can hardly be understood to mean that prosecutions begun under regulations preserved by Section 2420(a) shall abate. See H.R. Rep. No. 96-200, 96th Cong., 1st Sess. 30 (1979).

agency regulations promulgated pursuant to delegated authority have the effect of law, *Paul* v. *United States*, 371 U.S. 245, 255 (1963); *Public Utilities Commission* v. *United States*, 355 U.S. 534, 542-543 (1958), the savings statute also applies to regulations amended between the time of the unlawful conduct and the indictment. As we explained above, pages 7-14, the restrictions on strategic exports at issue in this case, including the Commodity Control List, were promulgated in accordance with a lawful exercise of executive authority.[20] It follows that the later amendment to the List does not abate this prosecution.

3. Petitioners' remaining contentions require little discussion.

a. Petitioners claim (Pet. 57-59) they were denied a fair trial because of three alleged instances of prosecutorial misconduct: a failure to return subpoenaed documents; an impermissible interference with a defense witness; and a televised interview with the prosecutor. These claims are without legal or factual basis.

Petitioners assert (Pet. 57) that "exculpatory documents were given to government agents and not returned." The court of appeals found (Pet. App. A-23), however, that petitioners had "made no factual showing, apart from a self-serving assertion by Walter Spawr in an affidavit supporting a motion to dismiss, that the prosecution refused to disclose documents within its possession. In fact, the record indicates

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[20] Contrary to petitioners' claim (Pet. 53) the change in licensing threshold from 1200 to 2500 watts is clearly substantive, not procedural.

that [petitioners] did not fully comply with the grand jury's subpoenas." [21]

Petitioners' "bare assertions that the conduct of a Department of Defense (DOD) attorney impermissibly interfered with an expert witness" (Pet. App. A-23) similarly fall short of showing the claimed denial of confrontation rights (Pet. 57-58). As the court of appeals found (Pet. App. A-23 to A-24):

> The DOD attorney was not a member of the prosecution team: he attended the trial only to answer possible questions concerning classified information. His contact with the witness did not constitute interference [22]

Although the DOD attorney returned to Washington, D.C., before completion of the trial, petitioners have failed to show how this denied them a fair trial.

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[21] The government offered to present evidence receipts showing the falsity of petitioners' assertion (Tr. 15-16). See also Tr. 14-17, 917-924 (petitioners withheld documents called for by grand jury subpoenas).

[22] On cross-examination, defense expert witness Dr. Franken was asked the following question about laser cavity output and power output ratio (Tr. 1747):

> Q: You said smaller ratio on some lasers. What would these smaller ratios be?

Before answering, Franken asked the district court for leave to confer with his counsel, the DOD attorney. The district court called a recess. When Franken resumed his testimony after the recess, the government did not follow through with the question and defendants did not ask the question. Indeed, the defense did not conduct any redirect examination of Dr. Franken (Tr. 1774, 1982-1983). Clearly, the petitioners suffered no prejudice. If they had thought it was important to elicit the answer, they could have pressed the issue while Franken was on the stand and then allowed the district court to take appropriate action if Franken declined to answer.

Nor did petitioners demonstrate that they were prejudiced by a television broadcast that included an interview recorded nearly three months earlier with the Assistant U.S. Attorney. As the court of appeals noted (Pet. App. A-25), "the prosecutor[] spoke generally about the Government's investigations into export violations [and] * * * stated his belief that American businessmen had indeed exported high-technology items to the Soviet Union; he did not mention [petitioners] or the laser mirror sales." Although the network juxtaposed the interview with a film of petitioners leaving the courtroom, the broadcast did not identify petitioners. Moreover, the Assistant U.S. Attorney informed the court of the time that the broadcast would be aired, and the trial judge "specifically instruct[ed] the jury not to watch any news program on the particular television channel or to talk to anyone who might have" (*id.* A-26).

b. Petitioners claim (Pet. 59-60) that co-conspirator statements were admitted without the requisite showing, by independent evidence, of the existence of the conspiracy and the connection of the declarant and petitioners to it. Petitioners also suggest a conflict among the circuits as to what constitutes independent evidence (*ibid.*). In this case, however, it is beyond doubt that the statements were properly admitted.

Petitioners' assertion (Pet. 60) that the government's independent evidence "consisted of additional declarations of the co-conspirators, no acts were proffered", is belied by the record. As the court of appeals found (Pet. App. A-28 to A-29), there was

> ample evidence independent of the conspirators' statements. * * * [Petitioners] concede that they knew of the Soviet orders, that Walter Spawr signed the export license application relating to

> the second Soviet order, that Wolfgang Weber sent an end-user statement to Walter Spawr, that after the export license was denied the company continued to manufacture the mirrors to the specifications of the second Soviet order, that Frances Spawr furnished the valuations on the shipper's export declarations for both orders, that they shipped part of the first order and all of the second order of mirrors to West Germany and Switzerland, and that Weber later shipped the mirrors to Moscow. Weber's testimony on his own role in the conspiracy was not hearsay evidence, and it substantiates the existence of the conspiracy.

This case thus presents no occasion to determine the circumstances under which other co-conspirator declarations may qualify as independent evidence for admission of a statement under Fed. R. Evid. 801(d)(2)(E).

Furthermore, petitioners show no prejudice from the criteria for independent evidence applied in this case, nor could they, since the court of appeals applied the more stringent test used by the Ninth Circuit, among others, requiring substantial independent proof apart from the hearsay declarations (Pet. App. A-27). See *United States* v. *Perez*, 658 F.2d 654, 658 (9th Cir. 1981). Thus, the resolution of any conflict among the circuits could not possibly change the result in this case.

c. Petitioners' final contention (Pet. 61-63) that the evidence was insufficient to sustain their convictions is insubstantial. The court of appeals correctly concluded (Pet. App. A-29 to A-30) that "[t]he evidence, when viewed in the light most favorable to the Government, was sufficient to permit any rational trier of fact to find each of the [petitioners] guilty

beyond a reasonable doubt." See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). This fact-bound result is well supported by the record [23] and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

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[23] Contrary to petitioners' claim (Pet. 62), the evidence as to Count 10 (conspiracy) did not predate the October 1976-July 1977 period charged in the indictment. The evidence showed that after the rejection of the license application on October 7, 1976 the following occurred: (1) Walter Spawr asked Weber to "save" the order and Weber said to ship the mirrors to Zurich, Switzerland (Tr. 823); (2) Frances Spawr told Jackie Topping they would send the mirrors to Russia anyway and would use a Swiss address (Tr. 592-596); (3) in a telephone conversation in November 1976, Weber gave Frances Spawr the address of the Swiss forwarder (Tr. 60; Exh. 14); (4) Frances Spawr instructed Corine Pettit in January 1977 to list false values on the shipping papers for the February 1977 shipments (Tr. 1900).

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